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AARAVALLI S MUTHIAH v. DR NG HEE HUA & ANOR

HIGH COURT MALAYA, PULAU PINANG
ABDUL WAHAB MOHAMED JC
[CIVIL APPEAL NO: 12A-11-03-2016]
15 JUNE 2016

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CIVIL PROCEDURE: *Discovery – Application for – Claim for tort of negligence – Claimant underwent surgery to treat medical symptoms but symptoms still persisted after surgery – Claimant relied on CT scan films in claim – Application for discovery of CT scan films by respondent – Claimant failed to produce CT scan films – Whether detrimental to respondents – Whether respondents could prepare defence without production of CT scan films – Whether claim ought to be struck out – Rules of Court 2012, O. 24*

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EVIDENCE: *Documentary evidence – Non-production – Claim for tort of negligence – Claimant underwent surgery to treat medical symptoms but symptoms still persisted after surgery – Claimant relied on CT scan films in claim but failed to produce same – Whether detrimental to respondents – Whether respondents could prepare defence without production of CT scan films – Whether claim ought to be struck out – Rules of Court 2012, O. 24*

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TORT: *Negligence – Medical negligence – Claim – Claimant underwent surgery to treat medical symptoms but symptoms still persisted after surgery – Failure to produce CT scan films relied upon by claimant – Whether detrimental to respondents' defence – Whether claim proved*

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The appellant was a patient of the first respondent, a consultant ear, nose and throat surgeon, and was treated at the second respondent's hospital. Following a motor accident, the appellant came to see the first respondent and was diagnosed with sinusitis and loss of sense of smell or anosmia. The appellant came to see the first respondent on multiple occasions, complaining of a blocked nose and facial pain. The first respondent treated the appellant conservatively but the symptoms were recurrent. During the course of the appellant's treatment, two CT scan films were taken and developed by the second respondent. The appellant finally underwent a surgery to treat the symptoms but still complained of anosmia after the said surgery. Dissatisfied with the outcome, the appellant commenced a suit at the Sessions Court against the respondents on grounds of negligence. The appellant referred to the CT scans in her statement of claim and amended statement of claim. The first respondent filed an application under O. 24 r. 11 of the Rules of Court 2012 ('the ROC') to inspect the CT scan films in order to prepare for his defence. However, the appellant failed to produce the CT scan films and thus the Sessions Court Judge ('the SCJ') dismissed the appellant's suit under O. 24 r. 16(1) of the ROC. Hence, the present appeal. The appellant submitted that (i) the first respondent's defence had been formulated and

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filed; (ii) striking out was not one of the orders/prayers prayed for in the first respondent's application; and (iii) the SCJ should have allowed the appellant to proceed with the trial as she could have her own ways to prove her case even without the CT scan films, *ie* by calling an expert.

Held (dismissing appeal):

(1) The purpose of O. 24 r. 16(1) of the ROC is to secure compliance relating to the production of the documents which the appellant possessed and sought to rely on in initiating the suit. Despite referring to the CT scan films in her amended statement of claim, the appellant did not file or produce them in her bundle of documents. As the CT scan films were pleaded, they must be produced by the appellant. The SCJ was correct in dismissing the appellant's case due to her failure to produce the CT scan films. (paras 34 & 36)

(2) The CT scan films were crucial to the first respondent's defence. Without them, the first respondent would not have been able to prove, during trial, that he acted in a competent manner in accordance with the standard expected of the medical profession. The crippling of the first respondent's case by the appellant's failure to produce the CT scan films would inhibit the just and fair disposal of this suit. The first respondent was disadvantaged without the CT scan films. Without the CT scan films, the expert engaged by the first respondent could only give an opinion based on the evaluation made post-operation; only the CT scan films could show the state of the appellant's health pre-operation. The expert could not give a proper report without the production and inspection of the CT scan films, resulting in disputes during the trial. The CT scan films were necessary to save costs and expedite the proceedings. (paras 41, 46 & 48)

Case(s) referred to:

Leslie S Holmes v. Engineering Science Inc [1993] 1 AMR 27 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 ***(refd)***
Phoolchand Garg v. Gopaldas Agarwal and Others AIR 1990 MP 135 Madras ***(refd)***
Rafidain Bank v. Agom Universal Sugar Trading 8 Co [1987] 3 All ER 859 ***(refd)***
Taylor v. Anderton (Police Complaints Authority Intervening) [1995] 1 WLR 447 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 24 rr. 10, 11, 13, 16(1), O. 92 r. 4

For the appellant - Brijnandran; M/s Brijnandan Singh Bhar & Co
For the respondent - Fazleeza Azli; M/s Chan Ban Eng & Co
For the 1st respondent - Loo Peh Fern; M/s Skrine

Reported by Najib Tamby

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JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

[1] This is an appeal from the appellant/plaintiff against the decision of the learned trial Sessions Judge striking out the appellant/plaintiff case on an application made by the first defendant/respondent under O. 24 r. 11 of the Rules of Court 2012 for the following orders namely:

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(i) That the appellant/plaintiff allow the first respondent/defendant, its solicitors, and/or the expert witness engaged by the first respondent/defendant to inspect the CT scan film of the appellant/plaintiff dated 21 July 2011 and obtain copies of the CT scan film;

(ii) That the appellant/plaintiff allow the first respondent/defendant, its solicitors, and/or the expert witness engaged by the first respondent/defendant to inspect the CT scan film of the appellant/plaintiff dated 19 January 2012 and obtain copies of the CT scan film;

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(iii) Costs of this application be borne by the appellant/plaintiff;

(iv) Further and/or alternatively, any orders or relief as this honourable court deems fit in order.

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Backgrounds Facts

[2] The appellant/plaintiff was a patient of the first respondent/defendant and was treated at the second respondent/defendant hospital between 21 July 2011 and 16 August 2012.

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[3] The appellant/plaintiff initially came to see the first respondent/defendant after being involved in a motor vehicle accident and the appellant/plaintiff was diagnosed with sinusitis and subsequently with anosmia (loss of sense of smell). The first respondent/defendant practices as a consultant ear, nose and throat surgeon at the second respondent/defendant hospital.

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[4] The appellant/plaintiff came to see the first respondent/defendant on multiple occasions complaining of a blocked nose and facial pain. The first respondent/defendant tried to treat the appellant/plaintiff conservatively for months but the symptoms were recurrent.

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[5] During the course of the appellant/plaintiff's treatment, two CT scan films were taken and developed by the second respondent/defendant. The first was taken on 21 July 2011 and the second was taken on 19 January 2012.

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[6] On 24 April 2012, after the courses of conservative treatment failed to help, the appellant/plaintiff agreed to undergo surgery to treat her symptoms. After the surgery, the appellant/plaintiff still complained of anosmia.

[7] Dissatisfied with the outcome, the appellant/plaintiff filed a suit against both respondents for negligently causing the anosmia during the course of the surgery.

Grounds Of The First Respondent/Defendant's Application

[8] The appellant/plaintiff has referred to the CT scan dated 21 July 2011 in para. 7 of its statement of claim and to the CT scan dated 19 January 2012 in para. 16 of its amended statement of claim.

[9] The appellant/plaintiff took possession of the CT scan films dated 21 July 2011 and 19 January 2012.

[10] The first respondent/defendant sent a notice to produce the CT scan films under O. 24 r. 10 of the Rules of Court 2012 to the appellant/plaintiff on 7 August 2015.

[11] By way of letter dated 13 August 2015, the appellant/plaintiff refused to produce the requested CT scan films which are required by the first respondent/defendant to prepare its defence.

Sessions Court's Decision

[12] The application was heard on 15 February 2016 before the learned Sessions Court Judge, who reserved the decision to 1 March 2016 and found in favour of the first respondent/defendant:

(a) As the appellant/plaintiff could not produce the two CT scan films, the learned Sessions Judge, in exercising his power pursuant to O. 24 r. 16(1) of the Rules of Court 2012, ordered the suit to be dismissed with costs of RM1,000 to be paid by the appellant/plaintiff to the first respondent/defendant and with liberty for the appellant/plaintiff to file afresh.

(b) The learned Sessions Judge found that without the production of the two CT scan films by the appellant/plaintiff, the first respondent/defendant would not have a fair trial.

[13] Thus, the appellant/plaintiff dissatisfied with the learned Sessions Judge's decision, filed this present appeal.

First Respondent/Defendant's Submission

[14] The first respondent/defendant submitted that the learned Sessions Judge was correct in allowing the first respondent/defendant application for production and inspection of the two CT scan films as the films are necessary for a fair disposal of trial.

[15] It is further submitted that the learned Sessions Judge was correct in dismissing the appellant/plaintiff's suit, due to the appellant/plaintiff's failure to produce the two CT scan films.

[16] Despite the appellant/plaintiff referring to the two CT scan films in its amended statement of claim, the appellant/plaintiff did not file or produce them in its bundle of documents. The first respondent/defendant submitted that as the CT scan films are pleaded in its amended statement of claim, the CT scan films must be produced by the appellant/plaintiff.

[17] The learned Sessions Judge has rightfully dismissed the suit due to the appellant/plaintiff's failure to comply or failure to produce the two CT scan films. The learned Sessions Judge was magnanimous in granting the appellant/plaintiff liberty to file afresh when the appellant/plaintiff is able to produce the two CT scan films.

[18] The first respondent further submitted that the two CT scan films are crucial to the first respondent/defendant's defence, without which, the first respondent/defendant will not be able to prove at trial he has acted in a competent fashion according to the standards expected of the medical profession.

[19] Neither the first respondent/defendant nor second respondent/defendant have or kept copies of the two CT scan films within the medical records. The original CT scan films were released to the appellant/plaintiff upon the appellant/plaintiff's request.

[20] The first respondent/defendant submitted that the CT scan films are necessary to save costs and expedite the proceeding. Without the production and inspection of the two CT scan films, the expert engaged by the first respondent/defendant, cannot give a proper report, resulting in disputes during the trial.

[21] The first respondent/defendant further submitted that the appellant/plaintiff did not file any affidavit in reply to resist the first respondent/defendant's application for the production and inspection of the two CT scan films which the failure tantamount to an admission by the appellant/plaintiff of the facts asserted by the first respondent/defendant in the application.

The Appellant/Plaintiff's Submission

[22] The appellant/plaintiff submitted that the appellant/plaintiff did not remember she had got the CT scan films from the second respondent/defendant. The appellant/plaintiff stated that she would look for it if it has actually been released to her. Her husband then re-collected she had taken it to the Penang General Hospital for second opinion and may have given it to the doctor there. She checked with the General Hospital but got a negative reply.

[23] The appellant/plaintiff submitted that the appellant/plaintiff has all along maintained that she is unable to locate the CT scan and as such she did not file any affidavit in reply.

[24] The appellant/plaintiff further submitted that all the information on the patient, specifically on the appellant/plaintiff is entered into the computer and the CT scan copy is available on the computer of the first respondent/defendant or on the hard drive which can be retrieved. Therefore, the appellant/defendant submitted that this application is a fishing expedition.

[25] On the issue of preparing the defence, the appellant/plaintiff submitted that the defence has already been formulated and filed. It is contrary to the cause of justice to permit the appellant/plaintiff to refer and rely on documents and not permit the first respondent/defendant to have sight of them.

[26] The appellant/plaintiff further submitted that the CT scan films are the first respondent/defendant's document. This CT scan was taken at the second respondent/defendant hospital at the request of the first respondent/defendant. The first respondent/defendant upon reading the CT scan had made up his mind what sort of operation he would want to perform.

[27] On the issue of the learned Sessions Judge striking out the appellant/plaintiff's case for non-production of the CT scan films, the appellant/plaintiff submitted that the striking out is not one of the orders/prayers prayed for in the first respondent/defendant application. Therefore the learned Sessions Judge was wrong in law in allowing the appellant/plaintiff's action to be struck off with cost of RM1,000.

[28] It is further submitted that the learned Sessions Judge should have allowed the appellant/plaintiff to proceed with the trial and the appellant/plaintiff may have her own ways to prove her case even without the benefit of the CT scan, for example, by calling an expert to support her case. Thus, because of the decision made by the learned Sessions Judge, the negligent of the first respondent/defendant will get away merely on the non-production of a document of which he has full knowledge whereas the CT scan films can be retrieved from the computer system of the second respondent/defendant hospital.

The Law

[29] The applicable rules under O. 24 of the Rules of Court 2012 (RC 2012) are rr. 10, 11 and 13 which relevant provisions are reproduced for convenience of reference:

A **10. Inspection of documents referred to in pleadings and affidavits (O. 24 r. 10)**

(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to
B produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within 7 days after the service thereof at which the documents, or such of them as he does
C not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11. Order for production for inspection

D (1) If a party who is required by Rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1):

(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2)

(b) objects to produce any document for inspection; or

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(c) offers to inspect at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to rule 13(1), the Court may, on the application of the party entitled to inspect, make an order in Form 43 for production
F of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any
G documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that
H they relate to a matter in question in the cause or matter.

13. Production to be ordered only if necessary, etc (O. 24 r. 13)

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the
I Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

Finding Of Court

[30] This is the appellant/plaintiff's appeal against the decision of the learned Sessions Judge who allowed the first respondent/defendant's application for the production and inspection of the two CT scan films under O. 24 r. 11 of the Rules of Court 2012. The learned Sessions Judge also dismissed the appellant/plaintiff's suit, due to the appellant/plaintiff's failure to produce the two CT scan films.

[31] A defendant is entitled to inspect documents referred to in the affidavit of the plaintiff and such documents referred to but not produced by the plaintiff, can be called for by the defendant by way of discovery and the defendant will have the right of inspection thereof. (see *Phoolchand Garg v. Gopaldas Agarwal and Others* AIR 1990 MP 135).

[32] It is important for me to note in this case that the appellant/plaintiff had referred to the:

(a) CT scan film taken on 21 July 2011 at para. 7 of its amended statement of claim; and

(b) CT scan taken on 19 January 2012 at para. 16 of its amended statement of claim.

[33] I refer to the Court of Appeal case of *Rafidain Bank v. Agom Universal Sugar Trading Co.* [1987] 3 All ER 859 where it was held that the court has jurisdiction to order discovery of documents referred to in a party's pleadings and affidavits notwithstanding that the documents were not in the custody, possession or power of that party, but the absence of custody, possession or power could well amount to a good cause for the court to refuse to exercise its discretion. In that case, Watkins LJ also made the following observation:

> I see no reason whatsoever why the broad scope of rr. 10 and 11 should be restricted in any way subject of course to the exercise of the court's discretion. It is plain to me that the additional power given to the court in rule 11(2) contains an exceptional restriction, namely that the making of an order is dependent on whether the documents sought are in the possession, custody or power of the party to whom the order is made is directed.

[34] In this case before me, despite the appellant/plaintiff referring to the two CT scan films in its amended statement of claim, the appellant/plaintiff did not file or produce them in its bundle of documents. As the CT scan films are pleaded in the amended statement of claim, I am of the considered view that the CT scan films must be produced by the appellant/plaintiff.

[35] Order 24 r. 16 of the Rules of Court 2012 reads as follows:

> **16. Failure to comply with requirement for discovery**
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> (1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rule 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and the judgment be entered accordingly.

[36] In other words, the purpose of O. 24 r. 16(1) of the Rules of Court 2012 is to secure compliance relating to the production of the documents which the appellant/plaintiff possess and has sought to rely on in initiating this suit. Thus, having gone through the law, I am of the opinion that the learned Sessions Judge was correct in dismissing the appellant/plaintiff's case, due to the appellant/plaintiff's failure to produce the two CT scan films.

[37] I now deal with the issue to what extent the CT scan films is important to this suit. Edgar Joseph Jr SCJ sitting at the High Court of Penang in the case of *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 stated at p. 585 of the report as follows:

> The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[38] Further down the same page, His Lordship Edgar Joseph Jr SCJ had this to say:

> As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute.
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> More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' (Rules of the High Court, O. 24 r. 1(1)) or 'relating to any matter in question in the cause or matter' (O. 24 r. 3(1)). In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v. Phillips* [1879] 40 LT 815, 821). In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. (See *George Ballantine & Sons Ltd. v. Dixon & Son Ltd.* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

[39] Continuing further on the same page, this was what His Lordship Edgar Joseph Jr SCJ said: A

> The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of 'materiality' merits quotation; there he says this:
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> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought. B
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> I note that proposition received judicial approval in *Format Communications Mfg. Ltd. v. ITT (UK) Ltd.* [1983] FSR 473 CA.

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[40] Thus reverting to the present case, the appellant/plaintiff has clearly relied on the two CT scan films in its amended statement of claim at paras. 7 and 16. The evidence supporting the fact that the two CT scan films are with the appellant/plaintiff is not rebutted by the appellant/plaintiff. In addition, the appellant/plaintiff has made an admission that she could not locate the two CT scan films. D

[41] I am of the opinion that the CT scan films are crucial to the first respondent/defendant's defence, without which, the first respondent will not be able to prove at the trial that he has acted in a competent fashion according to the standards expected of the medical profession. The crippling of the first respondent/defendant's case by the appellant/plaintiff's failure to produce the two CT scan films will inhibit the just and fair disposal of this suit. E

[42] At this juncture, I am of the considered view that if this court does not dismiss the suit due to the appellant/plaintiff's failure to comply with an order for the production and inspection, then the first respondent/defendant will effectively be denied a fair trial. The appellant/plaintiff will be free to refuse to comply with no consequences and will further be able to capitalise its position with an unfair advantage. F

[43] I am also of the opinion that the learned Sessions Judge was correct in his finding that the two CT scan films are necessary for the first respondent/defendant to inspect for the purpose of trial. The law says that the court has power to order the production and inspection of the document under O. 24 rr. 11 and 13 of the Rules of Court 2012, or under the inherent jurisdiction pursuant to O. 92 r. 4 of the Rules of Court 2012. G H

[44] Again, I am of the considered view that the two CT scan films are vital for the expert to form a full and cohesive opinion. The CT scan films are necessary in the preparation of the first respondent/defendant's defence. Therefore, without the said CT scan films, it would undoubtedly cause an unfair disposal of the case. I

[45] In this regard, I am agreeable with the decision in the case of *Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, the Court of Appeal held at pp. 40 and 41:

> Under O. 24 r. 13(1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of the opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r. 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery.

[46] Thus reverting to the present case, I am of the opinion that the first respondent/defendant is disadvantaged without the CT scan films. The films are pivotal in its role for the first respondent/defendant to construct his defence. Without the CT scan films, the expert who engaged by the first respondent/defendant can only give opinion based on the evaluation made post-operation. Only the two CT scan films can show the state of the appellant/plaintiff's health pre-operation.

[47] And in considering the application, the court should bear in mind the words of Sir Thomas Bingham MR in *Taylor v. Anderton (Police Complaints Authority Intervening)* [1995] 1 WLR 447, at p. 462 that:

> The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection.

[48] In addition, I am of the considered view that if the two CT scan films are produced, the expert engaged by the first respondent/defendant will be able to prepare a thorough expert report based on all the documents pleaded. Without the production and inspection of the CT scan films, the expert cannot give a proper report, resulting in disputes during the trial. The CT scan films are necessary to save costs and expedite the proceedings.

[49] On the issue of "fishing expedition" submitted by the appellant/plaintiff, I would hereby highlight the case of *Leslie S Holmes v. Engineering Science Inc* [1993] 1 AMR 27, where *inter alia* it says that fishing expeditions only applies on the grounds that the documents are too wide and vague.

[50] Thus reverting to the present case, I am of the opinion that the documents requested are specific and are referred to in the first respondent's notice to produce ie, the two CT scan films. Furthermore, the amended statement of claim clearly pleaded the two CT scan films.

[51] It is pertinent for me to note that, from the evidence, it is an undisputed fact that the appellant/plaintiff has taken possession of the said two CT scan films. The importance of the said CT scan films is not negated by the examination of the expert or the witnesses. The said CT scan films were taken before the operation, giving conclusive evidence as to the state of the appellant/plaintiff's condition prior to the operation.

[52] On the issue the appellant/plaintiff did not file any affidavit in reply to resist the first respondent/defendant's application, in this regard, I am agreeable with the decision in the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ, where the Court of Appeal held at p. 614 (CLJ); p. 281 (MLJ) that:

> In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[53] Thus reverting to the present case, I am of the opinion that the failure of the appellant/plaintiff to file any reply affidavit tantamount to an admission by the appellant/plaintiff of the facts asserted by the first respondent/defendant in the first respondent/defendant's application for production and inspection of documents.

Conclusion

[54] In conclusion, based on the above said reasons, the appeal filed herein is dismissed with cost of RM4,000 to be paid forthwith by the appellant/plaintiff to the first respondent/defendant.

[55] Nevertheless, I substitute the order of dismiss with a liberty to file afresh by the learned Sessions Judge with the order of strike out with a liberty to file afresh.